IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

ADDISON RAYMOND KETCHUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BORIS KOSTELANETZ, Esq.,
Counsel for Petitioner,
52 Wall Street,
New York 5, New York.

JULES KITHOLZ,
EDWARD J. DAUS,
JON H. HAMMER,
Of Counsel.

INDEX

	Page
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Reasons for Granting the Writ of Certiorari	7
Point I—The Supreme Court of the United States has exclusive jurisdiction of this appeal under 18 U.S.C. § 3731 because the decision of the District Court dismissing Counts 2 through 8 of the indictment was based upon a construction of the statute upon which those counts of the indictment are founded	7
Point II—The permissible unit of prosecution under 18 U.S.C. § 281 is limited to an alleged wrongful course of conduct	14
Conclusion	21
Appendix:	
Opinion of United States Court of Appeals for the Second Circuit	1a

Cases Cited

Bell v. United States, 349 U. S. 81 (1954) 18, 20

Blockburger v. United States, 284 U. S. 299 (1931) 19

PAGE

Cropps v. Durden, Cowper 640 19

Ex Parte Snow, 120 U. S. 274 (1886) 19

Ladner v. United States, 358 U. S. 169 (1958) 17, 20

Patton v. United States, 42 F. 2d 68 (8th Cir. 1930) 18

Prince v. United States, 352 U. S. 322 (1957) 18, 20

United States v. Agnesi, 310 F. 2d 815 (2d Cir. 1962) 20

United States v. Alaimo, 297 F. 2d 604 (3d Cir. 1961) 18

United States v. Apex Distributing Co., 270 F. 2d 747 (9th Cir. 1949) 8

United States v. Bitz, 282 F. 2d 465 (2d Cir. 1960) 10, 11

United States v. Cashin, 218 F. 2d 669 (2d Cir. 1960) 17

United States v. Evans, 333 U. S. 483, 92 L. Ed. 823 (1947) 12

United States v. Hastings, 296 U. S. 188, 80 L. Ed. 148 (1935) 11

United States v. Hughes, 195 F. Supp. 795 (S.D.N.Y. 1961) 17

United States v. Keitel, 211 U. S. 370, 53 L. Ed. 230 (1908) 10, 11

United States v. Personal Finance Co., 174 F. Supp. 871 (S.D.N.Y. 1959) 17, 19

United States v. Sampson, 298 F. 2d 826 (5th Cir. 1962) 2, 14

United States v. Swift, 318 U. S. 442, 87 L. Ed. 889 (1943) 11

United States v. Tolub, 309 F. 2d 286 (2d Cir. 1962) 18, 20

United States v. Universal C.I.T. Credit Corp., 102 F. Supp. 179 (Mo. 1952) 9, 10

PAGE

United States v. Universal C.I.T. Credit Corp., 344 U. S. 218, 97 L. Ed. 260 (1952) 8, 16, 18, 19

United States v. Wayne Pump Co., 317 U. S. 200, 87 L. Ed. 184 (1942) 11

United States v. Woody Fashions, Inc., 190 F. Supp. 709 (S.D.N.Y. 1961) 17

STATUTES AND RULES

Title 48 U.S.C. Section 203 15

Title 18 U.S.C. Section 281 ..... 2, 3, 4, 5, 6, 7, 8, 10, 14, 15, 16, 17, 18, 19, 20

Title 18 U.S.C. Section 3731 ..... 2, 3, 4, 6, 7, 8, 9, 13

Title 28 U.S.C. Section 1254(1) 2

Rule 39(a), Federal Rules of Criminal Procedure 6

Public Law 87-849, 76 Stat. 1119 15

MISCELLANEOUS

Conflict of Interest and Federal Service (Assoc. of the Bar of the City of New York, Harvard University Press, 1960) 15

Senate Report No. 2243, 1962 U. S. Code Congressional and Administrative News, pp. 3852, et seq. 15

In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

ADDISON RAYMOND KETCHUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on the 25th day of June, 1963.

Opinions Below

The opinion of the United States District Court for the Southern District of New York (App. 27a)[1] is reported at 212 F. Supp. 53. The opinion of the Court of Appeals for the Second Circuit, which has not yet been officially reported, is set forth in the Appendix at page 1a.

[1] Parenthetical references are to the Certified Appendix Record in the United States Court of Appeals for the Second Circuit.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on the 25th day of June, 1963. By order of the Hon. John M. Harlan, Associate Justice of the Supreme Court of the United States, dated July 23, 1963, petitioner's time within which to file a petition for certiorari was extended to and including August 24, 1963.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code.

Questions Presented

1. Whether the Supreme Court of the United States has exclusive jurisdiction of an appeal taken by and on behalf of the United States from a decision of the District Court for the Southern District of New York in a criminal case dismissing an indictment, or any count thereof, where such decision is based upon the construction of the statute upon which the indictment is founded.

2. May the Court of Appeals, contrary to 18 U.S.C. 3731, take jurisdiction of an appeal by the government from an order and judgment of the District Court dismissing counts of an indictment where the District Court based its decision on a construction of the statute allegedly violated, that the permissible unit of prosecution was the course of conduct?

3. Whether, under the provisions of Title 18 U.S.C. Section 281, the permissible unit of prosecution is limited to a wrongful course of conduct or extended to each particular portion of the course of conduct.

4. Where several counts of a multi-count indictment fail to state an offense against the United States because the

permissible unit of prosecution under the statute allegedly violated is the course of conduct rather than each fragmented step, (3) dismissal of the duplicitous counts the appropriate remedy?

Statutes Involved

Title 18, United States Code:

§ 281. Compensation to Members of Congress, and officers in matters affecting the Government.

Whoever, being a member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust or profit under the United States.

§ 3731. Appeal by United States.

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside or dismissing any indictment or information, or any count thereof where such decision or judgment is based upon

the invalidity or construction of the statute upon which the indictment or information is founded.

. . . . . .

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeal in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section." (Portions not pertinent omitted.)

Statement

This is a petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, arising out of a reversal by that Court of a decision of the United States District Court for the Southern District of New York. The error of the Court of Appeals was two-fold:

1. The Court of Appeals wrongfully assumed jurisdiction of the appeal in violation of law, 18 U.S.C. 3731; and

2. The construction of the allegedly violated statute (18 U.S.C. 281) by the District Court was correct while that of the Court of Appeals was in error.

Addison Raymond Ketchum is one of two defendants named in a nine count indictment (App. 5a) filed on August 7, 1962 in the Southern District of New York.

Counts 1 through 8 of the indictment, contained in one paragraph, are encaptioned "Counts One Through Eight". The common charging paragraph charges the petitioner with a single alleged violation of Title 18, U.S.C., Sec. 281, the so-called Conflicts of Interest Statute, in that

while an employee of the International Cooperation Administration, United States Department of State, he unlawfully received compensation for services rendered in connection with a matter in which the United States had an interest, to wit: a foreign aid project in the Republic of the Philippines financed by the United States. A three-column table follows containing merely an itemization of the eight installments in which the compensation was allegedly received as charged in the single common introductory paragraph, and the corresponding dates of the alleged receipt thereof.

The ninth count of the indictment charges a conspiracy to commit the offense set forth in Counts 1 through 8. In greater detail it describes the alleged matter in which the United States had an interest, the alleged services rendered and the claimed payment of the compensation therefor. Indeed, the four overt acts set forth therein are identical to the substance of so-called Counts 1, 5, 6 and 8 of the indictment.

Petitioner moved for an order dismissing the counts designated 2 through 8 of the indictment on the ground that they did not state an offense against the United States. The motion, raising novel questions of law previously undecided under this statute, came on to be heard before the Hon. Archie O. Dawson, United States District Judge, on December 3, 1962.

The decision of Judge Dawson (App. 27a), entered in the Southern District of New York on December 14, 1962, dismissed Counts 2 through 8 of the indictment on the ground that said counts do not state an offense against the United States of America under 18 U.S.C. Sec. 281, in that they are merely duplicitous of the first count charged. It was the crux of Judge Dawson's opinion that the permissible unit of prosecution under 18 U.S.C. Sec. 281 was the course of conduct rather than each atomized fragment of the alleged offense.

On January 8, 1963, the United States of America filed a notice of appeal to the Court of Appeals for the Second Circuit from this decision.

Pursuant to Rule 39(a) of the Federal Rules of Criminal Procedure petitioner moved to dismiss the appeal of the United States on the ground that under 18 U.S.C. Section 3731, the Supreme Court has exclusive jurisdiction of the appeal by the government. It was petitioner's position that this decision dismissing counts of the indictment on the basis of the District Court's construction of the statute (18 U.S.C. Section 281) fell squarely within the provisions of the Criminal Appeals Statute (18 U.S.C. 3731), providing for direct appeals to the Supreme Court.

After argument of the motion to dismiss the appeal, the Court of Appeals reserved decision and then on April 15, 1963 ordered further argument requiring that at the time of such further argument the substantive merits of the appeal be also argued. Petitioner was ordered to file his brief not later than April 26, 1963 and on May 8, 1963 the court below heard reargument of the jurisdictional issue and argument on the substantive merits.

The Court of Appeals, although finding that Title 18 U.S.C. Sec. 3731, the Criminal Appeals Statute, was confusing and in need of a thorough overhaul, and despite the clear language of the statute, held that it had jurisdiction over the appeal. The underlying basis for accepting jurisdiction appears to be that the decision of the District Court rested both on a construction of the indictment as well as on a construction of the statute upon which it is founded.

The Court below then went on to consider the merits of the decision of the District Court and concluded that the dismissal of Counts 2 through 8 of the indictment was an inappropriate remedy.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

POINT I

The Supreme Court of the United States has exclusive jurisdiction of this appeal under 18 U.S.C. § 3731 because the decision of the District Court dismissing Counts 2 through 8 of the indictment was based upon a construction of the statute upon which those counts of the indictment are founded.

The decision of the District Court dismissing Counts 2 through 8 of the indictment was based solely upon its construction of Title 18 U.S.C. Section 281, the statute on which said counts are founded. More particularly, the decision turned on its construction of the following words contained in Section 281: "Whoever . . . receives or agrees to receive, any compensation . . .". (App. 31a, *et seq.*).

The District Court was concerned with the permissible unit of prosecution intended by such language, i.e., whether the unit of prosecution proscribed thereby is the alleged receipt of each installment of the alleged compensation, or the alleged wrongful course of conduct. The District Court specifically stated in its opinion that the question on the motion before it was only concerned with what was a repetitive charge of a single offense because the underlying statute proscribes only a course of conduct as the wrong prohibited and that such question is one of law requiring the Court to ascertain legislative intent. (App. 36a). In its analysis of this question, the District Court concluded that Congress intended to punish a wrongful course of conduct, and not each separate and distinct act in furtherance thereof. As a result of such statutory construction, the District Court determined that Section 281 did not forbid the activity charged in Counts 2 through 8 and that the allegations set forth therein failed to state

an offense under the statute. Accordingly, the District Court dismissed those counts of the indictment.

As stated hereinabove, the government, on June 8, 1963, filed a notice of appeal to the Court of Appeals for the Second Circuit from the decision of the District Court.

The jurisdiction of the court below over criminal appeals by the United States is founded on Title 18 U.S.C. Section 3731. *United States v. Apex Distributing Co.*, 270 F. 2d 747, 749 (9th Cir. 1949).

Where a decision of the District Court, dismissing counts of an indictment, is based upon a construction of the statute upon which the counts are founded the sole appeal by the United States is directly to the Supreme Court of the United States. Title 18 U.S.C. Section 3731. Under such circumstances, as here, jurisdiction in the Supreme Court is exclusive and the Court of Appeals is without appellate jurisdiction.

The decision of the court below, holding that it had jurisdiction to consider the appeal of the government, is contrary both to the explicit provisions of Title 18 U.S.C. Section 3731 and to the construction and application of said statute by this Court and by the United States Court of Appeals for other circuits.

The assumption of jurisdiction by the court below was based primarily upon its acceptance of the government's argument that the decision of the District Court was not based solely on its construction of Section 281 of Title 18 U.S.C., but rather that it was based in part, on a construction of this statute, and partly on a construction of the indictment, a conclusion not warranted by the record below.

The decision of this Court in *United States v. Universal C.I.T. Credit Corp.*, 344 U. S. 218, 97 L. Ed. 260 (1952), is dispositive of the issue. In *C.I.T., supra*, the issue on

the merits was identical to that in the case at bar, and this Court held that it had jurisdiction over the appeal pursuant to the Criminal Appeals Act, 18 U.S.C. 3731; 344 U. S. at 22f. The dismissal of the indictment by the District Court in *C.I.T.* [102 F. Supp. 179 (No. 19521] was based on the same ground as that raised here in the District Court below, to wit: that pursuant to its construction of the underlying statute, the permissible unit of prosecution was the course of conduct rather than each individual act constituting the course; that consequently there was a failure of the dismissed pleading to state an offense against the United States and a duplicitous pleading of counts (one count for each separate act committed in the course of conduct). As stated above, this Court held it had jurisdiction of the direct appeal under the Criminal Appeals Statute.

The court below, in its opinion, remarked that Section 3731 "... is, indeed, a confusing one ... and would benefit from a thorough overhaul." It is respectfully submitted that the court below in its "confusion", arbitrarily distinguished *United States v. Universal C.I.T. Credit Corp., supra*, on the sole ground the government argued that the District Court below misread the indictment, whereas, in *C.I.T., supra*, no such argument was advanced. Certainly, the mere assertion by the government in the court below does not displace reality. The fact is that the District Court below neither misconstrued the indictment nor did it even attempt to interpret or impute meaning to the language therein employed. The District Court here did no more than the District Court did in *C.I.T., supra*.

The District Court in the case at bar, as in *C.I.T., supra*, after assaying the allegations set forth in the pleading, after analyzing the language of the statute upon which the counts under attack were founded and after reviewing the intent of Congress in promulgating the statute, dismissed those counts on the same ground. The remarkable similarity of the cases is aptly demonstrated by the fact

that the District Court below relied in great measure on the substantive holding of *C.I.T., supra*, in formulating its opinion. Jurisdiction of this appeal, therefore, is here, as it was in *C.I.T., supra*, exclusively in the Supreme Court of the United States.

In *United States* v. *Kestel*, 211 U. S. 370, 53 L. Ed. 230 (1908), this Court laid down the following test, determinative of its jurisdiction over direct appeals by the government in criminal cases. "Even if the statute construed below were given the meaning which the government asserts is correct, would the indictment stand? If the answer is in the negative, i.e., if the indictment was properly dismissed on grounds independent of the construction of the statute, then appeal is not to this Court but is to the Court of Appeals. 211 U. S. at 386, 397-398." Conversely, if the answer is in the affirmative, i.e., the dismissal of the indictment was dependent on the statutory construction given by the court below, then appellate jurisdiction is exclusively in this Court.

The court below either overlooked the test laid down by this Court in *Kestel, supra*, or chose not to adhere to the guiding principle set forth therein. The government in the District Court and in the court below averred that Title 18 U.S.C. Section 281 makes the alleged receipt of each installment of compensation by petitioner a distinct offense thereunder. Assuming, *arguendo*, that the meaning of § 281, as interpreted by the government, is correct, Counts 2 through 8 (the dismissal of which was not based on any ground wholly independent of the ground that said counts failed to state an offense under § 281, as construed by the court below), would then withstand the attack of the motion to dismiss. Under the standard enunciated in the *Kestel* case, *supra*, appellate jurisdiction is exclusively in this Court.

The case at bar is not merely an echo of *United States* v. *Bits*, 282 F. 2d 465 (2d Cir. 1960), as the court below

erroneously assumed. In *Bitz, supra*, the District Court's decision expressly rested upon the inadequacy of the allegations of the indictment, in addition to its construction of the underlying statute. Thus, *Bitz, supra*, falls into the category of cases raising a double question, i.e., the sufficiency of the indictment itself apart from the statute and the statutory construction. Thus, the decision of the District Court in *Bitz, supra*, rested on other grounds wholly independent of the construction of the statute upon which the indictment was founded. Here, there was no attack on the sufficiency of the indictment itself apart from the statute.

The District Court, in *United States* v. *Bitz, supra*, not only construed the underlying statute, but also made an independent determination that the indictment as a pleading was legally insufficient. In *Bitz, supra*, as in other cases involving a double question, jurisdiction under the test enunciated in *United States* v. *Kittel, supra*, was properly in the Court of Appeals. *United States* v. *Sarlt*, 318 U. S. 442, 87 L. Ed. 889 (1943); *United States* v. *Wayne Pump Co.*, 317 U. S. 200, 87 L. Ed. 189 (1942); *United States* v. *Hastings*, 296 U. S. 188, 80 L. Ed. 148 (1935). But in the case at bar, no such double question is involved.

The inadequacy of the pleading below was not a wholly independent ground for the dismissal of Counts 2 through 8, but rather was the mechanical result of a ruling necessarily following from the construction of the underlying statute.

> "Where a court interprets a criminal statute so as to exclude certain acts and transactions from its reach, it would of necessity also hold expressly or impliedly, . . . that the indictment considered merely as a pleading was defective. Yet the essence of the ruling would be based upon a construction of the statute." *United States* v. *Wayne Pump Co.*, 317 U. S. 200, 206, 207, 87 L. Ed. 184, 189 (1942).

This Court in *United States* v. *Evans*, 333 U. S. 483, 92 L. Ed. 823 (1947), accepted jurisdiction of a direct appeal from an order of the District Court dismissing an indictment, which, as in the indictment below, clearly set forth the activity charged. The sole question before the District Court in *Evans*, *supra*, as below, was whether the alleged activity came within the scope of the acts forbidden by the statute upon which the indictment was founded:

> Where a dismissal of an indictment, or certain counts thereof, is based on the construction of a statute, the indictment must necessarily be looked to, for the purpose of applying the statute as construed. An assay of the language of Counts 2 through [illegible] of the indictment was, as in all cases, necessarily made by the District Court below to determine whether or not the activity charged therein constituted an offense under its construction of Section 287, the underlying statute. The decision of the court below, which would make such analysis by the District Court sufficient to take appellate jurisdiction away from this Court is in direct conflict with *United States* v. *Sampson*, 298 F. 2d 826 (5th Cir. 1962).

In *Sampson*, *supra*, the District Court construed the statute upon which portions of the indictment were founded, determined both the meaning of certain language therein contained and the purpose of Congress in enacting the statute, and examined the allegations of the indictment. Upon these considerations, it was held with respect to the facts set forth in the indictment, that the activity charged did not constitute an offense under the underlying statute. With relation to the question of a direct appeal to this Court where the District Court construed the indictment in order to formulate its decision, the Court of Appeals stated:

> "The district court had to determine the meaning of the act; particularly of the word 'execution', and to

> assay the language of the several counts to determine whether the actions charged did constitute execution of the scheme under its construction of the meaning of the words used in the statute. The decision reached by it was clearly based upon the . . . construction of the statute upon which the indictment . . . is founded". "[. . .] Construction of the meaning of the Statute was a *sine qua non* of a decision by the District Court. That being true, the Supreme Court of the United States has exclusive jurisdiction of the appeal." 298 F. 2d at 827, 828.

The decision of the District Court below is therefore deemed to be based solely upon its construction of the statute upon which Counts 2 through 8 of the indictment are founded. The court below should have certified this case to this Court since exclusive jurisdiction thereof is lodged in the Supreme Court of the United States pursuant to Title 18 U.S.C. Sec. 3731.

> "If an appeal shall be taken pursuant to this section to any court of appeals, which in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court." Title 18 U.S.C. Sec. 3731 (portions not pertinent omitted).

Because of the erroneous assumption of jurisdiction by the court below, petitioner has been compelled to invoke the discretionary power of this Court, i.e., a petition for certiorari, whereas in the event of a government appeal, he had a *right* in the first instance to have this case reviewed by this Court. The decision of the court below, which has denied such right to petitioner, is in direct conflict with decisions of this Court and of United States

Court of Appeals for the Fifth Circuit [*United States v. Sampson*, 298 F. 2d 826 (5th Cir. 1962)]. Indeed, the intent of Congress with respect to the jurisdiction of this Court over appeals by the United States in criminal cases is being, and will be in other cases, frustrated and impaired if the court below is not reversed. Because of the importance of the questions in the effective administration of federal criminal law and of the appellate process, the granting of a writ of certiorari is warranted.

POINT II

The permissible unit of prosecution under 18 U.S.C. § 281 is limited to an alleged wrongful course of conduct.

The eight substantive counts of the indictment charge the petitioner with having committed eight separate and distinct felony crimes. Each alleged receipt of money by petitioner is said to violate Title 18 U.S.C. Sec. 281. The validity of the ninth count of the indictment which charges a conspiracy to commit the offenses alleged in Counts one through eight, inclusive, and the validity of the first count was not placed in issue in either the District Court or in the court below.

The issue before the District Court, on petitioner's motion to dismiss Counts Two through Eight, inclusive, as failing to state an offense against the United States, chiefly concerned the allowable unit of prosecution mandated by Sec. 281, the statute upon which said counts are founded. In other words, to paraphrase the District Court (App. 30a), did Congress, when it enacted Sec. 281, intend to proscribe a wrongful course of conduct, or each particular act or transaction, all of which taken together, comprise the unlawful course?

Section 281, upon which Counts Two through Eight are founded, is vague and ambiguous, in the very language employed. Although we were approaching the centennial

of the statute at the time of indictment, there have been no more than ten litigated cases arising from its invocation. *Conflict of Interest and Federal Service* (Assoc. of the Bar of the City of New York, Harvard University Press, 1960). Indeed, the legislative history of Sec. 281 is equally as sparse and totally devoid of any clarifying construction.

The inherent problems of ambiguity in § 281 are demonstrated by the recent action of Congress in repealing the statute construed below and superseding it with an entirely new collection of conflict of interest rules under the Federal criminal code. Public Law 87-849; 76 Stat. 1119.

What little relevant legislative history exists in this area is fully set forth in Senate Report No. 2213, 1962 U. S. Code Congressional and Administrative News, pp. 3852, *et seq.* The Senate Report explains the repealer and amendment of this statute by stating that the present laws "... are confusing and inadequate . . ." 1962 U. S. Code Congressional and Administrative News, p. 3853.

A similar view is embodied in a special message to Congress, delivered by the President of the United States on April 4, 1961, wherein he stated that these statutes were of ancient vintage and lacked coordination and uniformity. The President pointed out in addition, that there existed overlap and inconsistency and that "... they are grossly deficient in form and substance." *Idem*, p. 3853.

Thus, the legislative history merely serves to support what at first examination is readily apparent, namely, that the statute in question is an enigma providing the courts with a legacy of ambiguity.

Despite the fact that Section 281 recently has been superseded by 18 U.S.C. Section 203, 76 Stat. 1121 (1962), the questions presented by this case are of great importance and will be of recurring significance in the administration

of Section 203, the enactment of which has totally failed to cure the patent ambiguity inherent in Section 281.

Section 281, provides, in pertinent part (as does the superseding Section 203 in substance) as follows:

> "Whoever, being an . . . officer or employee of the United States . . . directly or indirectly receives . . . *any* compensation for any services rendered . . ." (Emphasis supplied).

The statute, by use of the grammatically simple word "any", immediately raises the specter of that vague concept of Congressional intent and statutory interpretation. The particular problem created by such phraseology, and one which was fully and carefully considered by the District Court, relates to whether the statute permits a conclusion that each alleged separate receipt of monies constitutes a possible violation of 18 U.S.C. § 281, or whether, on the other hand, the reasonable intent and purpose of the statute was to penalize the allegedly wrongful course of conduct. The answer is not readily forthcoming. Cf. *United States* v. *Universal C.I.T. Credit Corp.*, 344 U. S. 218, 221 (1952); but a reasonable solution may be found in the cases interpreting statutes of striking similarity and from the principles of statutory construction which evolved therefrom.

There are three decisions in the Federal system which are particularly applicable to the case at bar. In *United States* v. *Universal C.I.T. Credit Corp.*, *supra*, wherein the word "any" raised a similar question of statutory construction, to wit: the unit of prosecution permitted thereby, the defendant was charged in thirty-two counts with numerous violations of the overtime and record-keeping requirements of the Fair Labor Standards Act, with respect to numerous employees and various pay periods. This Court, speaking through Mr. Justice Frankfurter, stated:

> "The offense made punishable under the Fair Labor Standards Act is a course of conduct. Such a reading

> of the statute compendiously treats as one offense all violations that arise from singleness of thought, purpose or action, which may be deemed a single 'impulse' . . ." 344 U.S. at 224.

Accordingly, this Court in *C.I.T., supra*, affirmed the decision below dismissing the duplicitous counts.

In *United States* v. *Personal Finance Co.*, 174 F. Supp. 871 (S.D.N.Y. 1959), the defendant was charged with numerous violations of credit controls in that loans were granted to many individuals in violation of the statutory restrictions. Similarly, in *United States* v. *Woody Fashions, Inc.*, 190 F. Supp. 709 (S.D.N.Y. 1961), the defendant was charged in an indictment with numerous violations of the Wool Labelling Act. In both cases, the word "any" was of significance in attempting to attribute a reasonable meaning to the underlying statute so as to determine the permissible unit of prosecution, as intended by Congress. In both cases, motions to dismiss were granted on the ground that the statute prohibited a course of conduct and not a particular portion of the unified whole. See also, *United States* v. *Cashin*, 281 F. 2d 669, 673 (2d Cir. 1960); *United States* v. *Hughes*, 195 F. Supp. 795 (S.D.N.Y. 1961).

As in the above cited cases, the petitioner has been charged in a relatively large number of counts with what, under a reasonable construction of 18 U.S.C. § 281, is essentially one alleged unlawful course of conduct.

Moreover, where, as here, Congress has failed to provide in clear and unambiguous language that each particular unit of an over-all course of conduct shall constitute a separate, individual and distinct offense to which criminal liability and punishment shall attach, this Court has always insisted that a construction of the statute be adopted in favor of lenity as opposed to a construction which is harsher in nature to the defendant. *Ladner* v. *United*

States, 358 U. S. 169, 177, 178 (1958); *Prince v. United States*, 352 U. S. 322, 329 (1957); *Bell v. United States*, 349 U. S. 81, 83 (1954). The general principles of statutory construction, enunciated by this Court in these cases, arose out of situations where the statute under question was similar to 18 U.S.C. § 281, in that there was lacking a clear Congressional intent as to the permissible unit of prosecution.

In its decision, the court below clearly demonstrated its misunderstanding of the thrust of petitioner's argument. By focusing its judicial attention solely on the allegations in the indictment, without any analysis of the underlying statute or the intent of Congress in its original enactment, the court below adopted the error urged by the government in the District Court. It is implicit in the decision of the court below that it was of the erroneous opinion that Sec. 281 could be violated on eight separate and distinct occasions even though the activity charged as unlawful be of a single continuous nature and even though Sec. 281 proscribes only a wrongful course of conduct.

Under Sec. 281 of Title 18 U.S.C., as alleged to have been violated in Counts 2 through 8, the gravamen of the offense is the *receipt* of any compensation. The petitioner, charged with such an alleged violation of this statute, is, therefore, in the passive position of a *receiver* of moneys. This, of course, is contrary to the situation in the bribery and extortion cases, where a crime is committed each time money is paid on the theory that each payment buys the desired protection for an additional period of time. See, *United States v. Marino*, 297 F. 2d 604 (3d Cir. 1961); *Patton v. United States*, 42 F. 2d 68 (8th Cir. 1930); *United States v. Tolub*, 309 F. 2d 286 (2d Cir. 1962).

In order for a statute to attach criminal stigma, which so concerned this Court in *United States v. Universal C.I.T. Credit Corp.*, 344 U. S. at 221, to each specific action of the accused, there clearly must appear a "new and sepa-

rate impulse" for such action. *United States v. Universal C.I.T. Credit Corp.*, *supra*; *Blockburger v. United States*, 284 U. S. 299 (1931); *United States v. Personal Finance Co.*, *supra*. While such new impulse may exist with respect to violations of the bribery and extortion statutes, involving the purchase of additional consideration with each payment, it certainly is not present with respect to a statute of the type here in issue.

Where a defendant is a more passive receiver of monies, the nature of the offense is one which, of practical necessity, is a continuing one having an extended duration in time. The peculiar nature of the crime charged by 18 U.S.C. § 281 is of a continuing nature and each receipt of an installment is not an independent and isolated act. This Court early held that where such a crime is made the subject of an indictment, the defendant may be charged with but one crime. *Ex Parte Snow*, 120 U. S. 274, 282-285 (1887). Such was the holding of this Court in *Ex Parte Snow*, *supra*, even though the offense had a continuous duration of nearly three years and charged the defendant with an unlawful cohabitation with seven different women. In reaching its determination, this Court relied heavily on the leading English case on this subject, *Crepps v. Durden*, Cowper 640, decided by Lord Mansfield. It is noteworthy that *Crepps v. Durden*, *supra*, was also concerned with a statute that turned similarly on the meaning of the word "any". The holding of this Court in *United States v. Universal C.I.T. Credit Corp.*, *supra*, is a more recent expression by this Court of the authority in this area. See also *Blockburger v. United States*, *supra*.

The government argued below that the petitioner cannot be prejudiced by the form of the indictment as originally drafted.

That no prejudice to the petitioner exists from the original form of the indictment will not stand careful analysis. It is evident that a lay jury, upon observing that a de-

fendant is charged with eight crimes as opposed to one, is likely to have a preconceived belief that he is necessarily guilty of at least one. Indeed, this attitude has been recently expressed by the court below in *United States v. Tolub*, 309 F. 2d 286 (2d Cir. 1962), wherein Judge Friendly stated in a concurring opinion:

> "The multiplication of counts in indictments has become a matter of serious concern because of the threat thereby posed to the effective working of the jury system and the possibility of sentences out of proportion to the true gravity of the offense." 309 F. 2d at 290.

Cf. *United States v. Amen*, 310 F. 2d 817 (2d Cir. 1962).

Moreover, petitioner runs the risk, if the court below is not reversed, of incurring a fine of $80,000 and/or incarceration for a period of 16 years in addition to the penalties imposed by the conspiracy count. Clearly, if Congress wished to attach such drastic criminal consequences, it would have so provided in clear and unambiguous language. *Ladner v. United States*, 358 U. S. 169 (1958); *Prince v. United States*, 352 U. S. 322 (1957); *Bell v. United States*, 349 U. S. 81 (1954). Cf. *United States v. Tolub*, 309 F. 2d 286 (2d Cir. 1962).

To hold, as the decision of the court below mandates, that each particular action taken in furtherance of the total course of conduct could constitute a separately punishable offense, would cause the severe sanctions of criminal liability under Sec. 281, Title 18, U.S.C., to depend upon the mere happenstance of whether payments were made in one lump sum or in installments. Obviously, such was not the intent of Congress.

The issues presented by this case have far-reaching importance with respect to the administration of the Federal Conflict of Interest statutes, and other similar federal

statutes, warranting a clear and unequivocal declaration thereon by this Court with respect to the permissible unit of prosecution proscribed thereby.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

BORIS KOSTELANETZ,
Attorney for Petitioner.

JULES RITHOLZ,
EDWARD L. DAUS,
JON H. HAMMER,
Of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 344 — October Term, 1962

(Argued May 8, 1963 — Decided June 25, 1963)

Docket No. 28083

UNITED STATES OF AMERICA,

Appellant,

v.

ADDISON RAYMOND KETCHUM,

Appellee.

Before:

MOORE, FRIENDLY and HAYS, *Circuit Judges.*

Appeal by the United States from an order of the District Court for the Southern District of New York, Archie O. Dawson, Judge, 212 F. Supp. 53, dismissing certain counts of an indictment as duplicative. Reversed.

ARTHUR I. ROSETT (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Arnold N. Enker, Assistant United States Attorney), *for Appellant.*

JULES RUBINTZ (Corcoran, Kostelanetz, Gladstone & Lowell, New York, New York), (Edward J. Daus, Jon D. Hammett, of Counsel), *for Appellee.*

Appendix

FRIENDLY, *Circuit Judge*:

Ketchum, formerly a Public Works Civil Engineering Adviser in the International Cooperation Administration (ICA), was indicted in the Southern District of New York for violating 18 U. S. C. § 281, now superseded by 18 U. S. C. § 203, 76 Stat. 1121 (1962). Section 281 made it a crime when any federal employee "directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim . . . or other matter in which the United States is a party or directly or indirectly interested," before any Government department or agency. Each violation of the statute was punishable by a fine of not more than $10,000 or imprisonment for not more than two years, or both.

Counts 1-8 of the indictment charged that Ketchum had received such compensation "for the amounts hereinafter set forth, for services rendered and to be rendered by himself and others," in relation to an agreement dated April 17, 1956, between the ICA and the National Economic Council of the Philippines and in relation to a contract dated January 4, 1957, apparently stemming from the earlier agreement, for the council's purchase of steel piles and related materials. This language was followed by a three column table, the respective columns being headed "Count," "Date Compensation Received," and "Compensation." The counts were numbered through 8, the dates ranged from July 2, 1957, through April 18, 1958, and the compensation was in eight separate amounts totaling $39,656.11. Count 9 charged that Ketchum and one Thompson, see *United States v. Thompson*, F. 2d (2 Cir. 1963), had conspired with corporations and other individuals in violation of 18 U. S. C. § 371 to defraud the United States in violation of § 281. The alleged

conspiracy involved. Ketchum's corruptly inducing the National Economic Council of the Philippines to incorporate in an invitation to bid on a contract for the reconstruction of a pier the exact specifications already prepared by one of the conspiring corporations, and also "to further preclude competition in the bidding on the aforementioned contract" by changing the terms from [illegible]. The overt acts charged were four deposits allegedly made in Ketchum's brokerage account in the Southern District of New York, corresponding in date and amount to the receipts alleged in Counts 1, 3, 6 and 8.

Ketchum moved to dismiss Counts 2-8 as being unduly duplications of Count 1 and not stating separate offenses against the United States. Judge Dawson granted the motion in an opinion, 212 F. Supp. 53. The United States appealed to this Court under 18 U. S. C. 3731, claiming that the district judge had misconstrued both the statute and the indictment and also that, even on the judge's view, he should not have dismissed Counts 2-8 but should at most have required the Government to consolidate the eight counts or to elect among them.

The case initially came before us on a motion by Ketchum contending that the Government should have taken its appeal directly to the Supreme Court. The argument was that the case was covered by the provision in 18 U. S. C. 3731 for such a direct appeal by the Government "From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded," and the ruling was not within the provision for an appeal by the Government to a court of appeals "From a decision or judgment setting aside, or dismissing any indictment or information, or any count

thereof except where a direct appeal to the Supreme Court of the United States is provided by this section." We postponed decision whether to certify the appeal to the Supreme Court pursuant to the final paragraph of § 3731 pending argument on the merits before the same panel.

Ketchum's challenge to our jurisdiction rests on the proposition that the district judge's dismissal of Counts 2-8 of the indictment was based on a reading of 18 U. S. C. § 281 that would refuse to make a separate crime out of each receipt of compensation where the receipts were passive and in pursuance of a single course of conduct—a reading which the Government claims to be wrong. But, as the very statement of Ketchum's argument indicates, the dismissal must also have rested on a construction of the indictment as charging only a single corrupt course of conduct by Ketchum and passivity in his receipts—a construction which the Government contends not to be a necessary one. It is plain that if the United States did not dispute the correctness of the district court's construction of the statute and rested its appeal solely on an allegedly erroneous construction of the indictment, the appeal would be to this court rather than directly to the Supreme Court. *United States v. Johns*, 345 U. S. 377 (1953). The same result should follow when the United States keeps both strings to its bow. On a direct appeal the Supreme Court is bound by the district judge's construction of the indictment. *United States v. Borden Co.*, 308 U. S. 188, 193 (1939). To allow such an appeal in a case like this would thus leave his construction of the indictment wholly immune to review at the instance of the Government. This consequence was indeed inevitable under the Criminal Appeals Act as it was originally enacted, 34 Stat. 1246 (1907), and as it stood for 35 years, but was meant to be avoided by the Act of May 9, 1942, 56 Stat. 271, for the first time.

providing for an appeal by the Government to the courts of appeals from certain judgments in criminal cases not directly appealable to the Supreme Court. See *United States* v. *Swift & Co.*, 318 U. S. 442 (1943). It would seem undesirable in the last degree to read the amended Act as requiring the Supreme Court to pass upon the application of a criminal statute to an indictment whose construction is itself in issue, in a case where the court of appeals, which Congress has authorized to review decisions involving the construction of indictments, would construe the indictment in such a way as to eliminate, alter or postpone the statutory issue. See *United States* v. *Hastings*, 296 U. S. 188, 193 (1935). The words of the Criminal Appeals Act do not compel such a reading; the purposes of Congress can be accomplished, without violence to the language, by reading the Act as saying that where a decision of a district court setting aside or dismissing an indictment or information, or a count thereof, as not within a statute as construed by it, rests in part on a construction of the indictment which the Government also contests, appeal will not lie directly to the Supreme Court but initially to the court of appeals—with the Supreme Court then being able to consider all pertinent issues on certiorari if it deems the case to warrant such review. *United States* v. *Hastings*, *supra*, 296 U. S. at 194; *United States* v. *Ritz*, 282 F. 2d 465, 469-71 (2 Cir. 1960).

No contrary conclusion is compelled by a sentence in Mr. Justice Reed's opinion in *United States* v. *Wayne Pump Co.*, 317 U. S. 200, 206-07 (1942),[1] on which appellee relies. Apart from the facts that *Wayne Pump* was decided under the Criminal Appeals Act as it stood prior to the 1942 amendment and that the sentence is only dictum

[1] "Where a court interprets a criminal statute so as to exclude certain acts and transactions from its reach it would of necessity also hold, expressly or impliedly, . . . that the indictment considered merely as a pleading was defective."

since the Supreme Court dismissed the appeal, we read it as upholding direct appeal to that Court only in the situation limned in Mr. Justice Reed's next sentence, namely, where "the essence of the ruling" dismissing the indictment is "based upon a construction of the statute" rather than of the indictment as well—a reading fortified by his statement in the same paragraph that "It was a statutory construction such as that just stated which led this Court to accept jurisdiction under the Criminal Appeals Act in *United States* v. *Hastings*, 296 U. S. 188, 195."[2] The statute is, indeed, a confusing one—see the four opinions in *United States* v. *Mersky*, 361 U. S. 431 (1960)—and would benefit from a thorough overhaul. Our interpretation of it, which we think sufficiently respects the language and carries out the discernible purpose, has the merit of tending to limit direct appeals to those important cases for which the Criminal Appeals Act was designed. See the history outlined in Frankfurter and Landis, The Business of the Supreme Court (1928), at 114 ff. and in Mr. Justice Frankfurter's dissent in *United States* v. *Mersky*, *supra*, 361 U. S. at 446-451. It also comports with the "dominant principle of having this [Supreme] Court review decisions only after they have gone through two judicial sieves." *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 92-93 (1960) (dissenting opinion of Mr. Justice Frankfurter). We hold that we have jurisdiction.

[2] At the cited page of the *Hastings* opinion, Chief Justice Hughes said that insofar as the district court had construed the indictment, "We are not at liberty to construe the indictment otherwise," and that claims depending on what the Government contended to be the proper construction of the indictment "must await a different and appropriate record." Under the 1942 amendment, alleged misconstruction of an indictment is now cognizable in a court of appeals.

[3] Appellee also claims that *United States* v. *Universal C I T Credit Corporation*, 344 U. S. 218, 225-226 (1952), requires a conclusion contrary to that which we have reached. The Supreme Court there took jurisdiction of an appeal from a dismissal of various counts of an indictment as not charging separate crimes and stated,

If Counts 1-8 are read apart from Count 9, the conspiracy count, they afford no basis for concluding, as the district judge here did, that they charged that "The payments to him [Ketchum] were all for a single act, either committed or to be committed. It was a bribe paid in installments and not a series of separate bribes."—even though the judge may well have been right in surmising that this is what the evidence will show. While all eight receipts were alleged to be "in relation to" two contacts, the language was broad enough to permit the Government, which had as yet given no bill of particulars, to prove that each payment was for a separate service by Ketchum. Neither do we think the judge's construction follows even if we consider the bare bones of the substantive counts as being supplemented by the flesh of the conspiracy count, as he apparently did. Ketchum was there alleged to have performed a considerable number of acts; that all of these were done in pursuance of a single agreement, under which the payments charged in Counts 1-8 would automatically be made to him, is a permissible reading but not one to which the Government would be confined by the indictment alone.

---

in affirming, that this would not preclude the Government "from now amending the information either to meet the exigencies of the evidence or to charge as separate offenses separate courses of conduct as to each substantive provision", but the Government had not argued in that case that the district judge had misread the information, as it here argues that the judge misconstrued the indictment. And the quoted language was addressed, not to the question of appellate jurisdiction, but to the excessive relief which the Supreme Court thought the district judge had there granted, even though it agreed with him that the information was based on an unsound theory—a point also arising in this case and discussed below.

Ketchum's motion for a bill of particulars was argued at the same time as his motion to dismiss Counts 2-8. It was granted only as to one item with respect to these counts, namely: "Specify the nature of the services allegedly rendered or to be rendered by the defendant * * * and for which he allegedly received compensation in the amounts set forth therein." The record does not show whether a bill of particulars has been furnished.

Moreover, even if it were far clearer than it now is that the Government's evidence would necessarily be limited as the judge thought, and if we should agree with his construction of the statute as permitting only one punishment in that event, dismissal of Counts 2-8 was still unwarranted. The draftsman "may cast the indictment in several counts whether the body of facts upon which the indictment is based gives rise to only one criminal offense or to more than one. To be sure, the defendant may call upon the prosecutor to elect or, by asking for a bill of particulars, to render the various counts more specific. In any event, by an indictment of multiple counts the prosecutor gives the necessary notice and does not do the less so because at the conclusion of the Government's case the defendant may insist that all the counts are merely variants of a single offense." *United States* v. *Universal C.I.T. Credit Corp., supra*, 344 U. S. at 225. See also *Dealy* v. *United States*, 152 U. S. 539, 542 (1894). The basis for requiring even an election among counts is not at all that the defendant may otherwise face multiple sentences. Decision as to the unit of punishment is not controlled by the form of the indictment; as Judge Wyzanski has said, "multiplicitousness never places a defendant in jeopardy of multiple sentences." *United States* v. *Mamber*, 127 F. Supp. 925, 927 (D. Mass. 1955). The reasons for requiring the Government to elect among counts in some cases are, rather, primarily those of promoting the order and efficiency of the trial and avoiding the risk that "the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes." *Ibid.* Whether election among Counts 1-8 should be required, either before or after the close of the evidence, is not before us. Under no view, however, was dismissal an appropriate remedy.

Reversed.